

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

STEPHEN E. YARNELL, Deceased

VS.

**STATE OF KANSAS - DEPARTMENT OF
TRANSPORTATION**

Respondent

AND

STATE SELF-INSURANCE FUND

Insurance Carrier

Docket No. **1,052,276**

ORDER

Claimant, the surviving spouse of Stephen E. Yarnell, the deceased, requests review of the May 30, 2012 Award by Administrative Law Judge (ALJ) Bruce E. Moore. The Board heard oral argument on September 11, 2012. The Workers Compensation Director entered an Order on August 8, 2012, appointing Joseph Seiwert to serve as an Appeals Board Member Pro Tem.

APPEARANCES

Kala A. Spigarelli of Pittsburg, Kansas, appeared for claimant. Jeffrey R. Brewer of Wichita, Kansas, appeared for the respondent and its insurance fund (respondent).

RECORD AND STIPULATIONS

The Board has considered the entire record and adopts the stipulations listed in the Award.

ISSUES

The ALJ found claimant failed to sustain her burden of proof that her husband's death arose out of and in the course of his employment with respondent. The ALJ found decedent's death was not caused by unusual exertion, excessive heat, or any "external force." Claimant, the only dependent of the deceased, claims the ALJ erred in finding Mr. Yarnell's injury and death did not arise out of and in the course of his employment. Claimant asks that the award be reversed.

Respondent argues Mr. Yarnell's death did not arise out of and in the course of his employment with respondent and that the ALJ correctly found the claim not compensable. Respondent contends the award should be affirmed.

The issue the Board must consider is: did the deceased's injury and death arise out of and in the course of his employment?

FINDINGS OF FACT

Having reviewed the evidentiary record, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings:

The deceased was age 63 when he died on June 3, 2010. He had worked for respondent as an equipment operator for over 20 years. By the time of Mr. Yarnell's death, he had attained the position of specialist, one step below that of supervisor. As he gained experience over the years and was promoted, his level of responsibility increased. By the time of Mr. Yarnell's death, his administrative and training duties had increased, however, he continued to perform the same physical labor as the other crew members. When the supervisor was absent from the work site, Mr. Yarnell was in charge.

On Thursday, June 3, 2010, the deceased and his crew were engaged in patching two areas on Highway 39 in Wilson County, Kansas. The crew was short-handed that day, so Mr. Yarnell participated directly in the process of laying down the asphalt. Mr. Yarnell could have engaged in other activities, such as flagging or driving the pilot vehicle. It was not unusual for claimant to work with the other crew members and perform the same duties.

Two areas of the highway were patched on June 3, 2010, each within close proximity to each other. Asphalt patching was generally done in the summertime because hotter weather helped the asphalt stick to the pavement. The deceased and the other crew members arrived at work at approximately 7 a.m. but they did not arrive at the work site until about 8:30 a.m. Mr. Yarnell worked with the patching crew until the second patch was completed at about 1:30-2 p.m. The crew took a 20-minute break between the completion of the first patch but before work on the second patch commenced. The first area took one to two hours to patch. The patching of the second area began at approximately 11 a.m. to 12 p.m.

The asphalt patching process Mr. Yarnell and his crew performed on June 3, 2010, essentially involved working on or near a machine called a "lay down machine." Before the lay down machine can begin operating, another machine, an oil distributor, sprays oil on the existing pavement. The oil acts as an adhesive, so that the asphalt sticks to the road surface. The lay down machine is a large piece of equipment with a "pan" on the front

where asphalt is placed. The asphalt is delivered to the work site by means of dump trucks. The asphalt is placed in the pan, which at times requires shoveling the asphalt from the dump truck into the lay down machine.

The lay down machine then heats the asphalt by means of propane burners. The asphalt is heated to 300 to 400 degrees Fahrenheit, following which the heated asphalt is applied by the lay down machine over the surface of the area to be patched. The lay down machine moves forward by means of a diesel engine that is part of the machine. The lay down machine runs on tracks, which evidently are similar to tank tracks.

In general, there are five workers involved directly in the asphalt patching process: two on the machine itself operating the equipment; one on each side of the machine; and one in back of the machine. The crew members on the sides and in back of the lay down machine walk as the machine moves forward, observing the application of the asphalt to ensure it is applied smoothly and in the proper thickness. The workers on each side and in back of the machine at times use shovels and rakes to manually move the asphalt so the patched area is covered completely and in an appropriate manner.

On June 3, 2010, in the first patching, the deceased walked 10 to 20 feet behind the lay down machine. He did not use a shovel in the first patching. In the second patching, Mr. Yarnell walked beside the machine, shoveling and raking asphalt as required.

On the date of his death, the deceased worked in a very hot environment, principally because of his close proximity to the lay down machine. No party contends otherwise. However, the deceased did not perform any unusual work or engage in any unusual exertion.¹ Nor was he exposed to air temperatures above the norm for a day in early June in Kansas. According to weather data contained in respondent's exhibit 1 to the regular hearing transcript, on June 3, 2010, the ambient air temperature at the approximate beginning of the deceased's shift (7 a.m.) was 68 degrees with a relative humidity of 88%; approximately when the deceased commenced the patching work (8:52 a.m.) the temperature was 72 degrees and the relative humidity was 78%; as the morning progressed, temperatures ranged in the mid-70s and the humidity decreased from 78% to 69%; and at 1:52 p.m. the temperature was 84 degrees and the relative humidity was 55%.

The crew took no lunch break because everyone wanted to complete the patching at that work site on June 3. According to the testimony of a crew member, Paul Leon, Mr. Yarnell looked and acted normally during the first patching, however, at some point during the second patching, Mr. Leon noticed the deceased looked pale. Mr. Leon suggested

¹ Madl Depo. at 19-20; Leon Depo. at 36-37, 42-43, 48-49, 50-51, 54-55.

Mr. Yarnell accompany another specialist, Mike Doyle, to take the unused asphalt back to a dump site located two or three miles away from the work site.

Mr. Doyle and Mr. Yarnell then left the work site in a dump truck to take the remaining asphalt to the dump site, referred to by Mr. Leon as "39 strip." About 15 minutes after the departure of the dump truck, Mr. Doyle returned to the work site, jumped out of the truck, and said "something is wrong with Steve."

When asked at his deposition whether he talked to Mr. Doyle about what occurred in the dump truck, Mr. Leon responded:

A. I asked him what he was like and everything and Mike told me that as soon as he [Mr. Yarnell] got in the dump truck he turned off the air conditioner and rolled down the window, and so he just thought he needed, you know, flesh [sic] air, so they drove there and as soon as they got to the strip he said that he [Mr. Yarnell] seemed like he was just tired and kind of took a little short nap, and then when he asked Steve, he said, he goes, where do I put it [referring to the asphalt], and he [Mr. Yarnell] goes, at the strip, and that was all. And he [Mr. Doyle] goes, we are at the strip. And Mike looked at him and tried to shake him and that's when Mike knew something was wrong, so he flew back to the work zone.²

Mr. Leon and another member of the crew, David Madl, thought the deceased was suffering from heat stroke. An ambulance coincidentally arrived at the work site en route to another emergency. The deceased was not responsive to the efforts of his fellow workers and the EMTs to revive him. Mr. Yarnell was taken by another ambulance to Neosho Memorial Regional Medical Center in Chanute, Kansas. Mr. Yarnell was pronounced dead shortly after he arrived at the hospital.

The death certificate indicated the causes of Mr. Yarnell's demise were: (1) spontaneous cardiac arrhythmia and (2) coronary atherosclerosis and cardiomegaly.

An autopsy report prepared by Erik K. Mitchell, M.D. dated November 22, 2010, summarizes the autopsy findings as follows:

Elevated vitreous sodium, chloride, and BUN are consistent with a degree of dehydration at the time of demise, but the death is consistent with a spontaneous, ischemically induced, arrhythmic event.³

² Leon Depo. at 28-29.

³ Galichia Depo., Ex. 3 at 1.

Sandra Yarnell, decedent's wife, testified Mr. Yarnell worked as an equipment operator specialist with the State of Kansas for over 20 years. Her husband generally worked from 8 a.m. to 4:30 p.m., however, those times varied depending on the nature of the work to be performed on a particular day. He worked Monday through Friday, for a total of 40 hours a week.

Mrs. Yarnell testified claimant was in good health and he had not been treated for heart disease. He did not have diabetes. However, he had been diagnosed with hypertension for which he was prescribed medication. Mr. Yarnell was not a smoker.

Mrs. Yarnell testified claimant was accustomed to working in the heat and he drank water regularly. The deceased in the last couple of years was doing more paper work and training. He was in the office more, but still participated in the road work.

Dr. Roger Evans is board certified in both cardiology and internal medicine. The doctor performed a records review at the request of respondent's counsel. Dr. Evans testified by deposition on February 29, 2012, at which the following exchange occurred:

Q. What was your finding, Doctor, and opinion with regard to Mr. Yarnell's cause of death in this unfortunate circumstance?

A. Well, the death certificate was quite clear that there was coronary disease. There was preexisting coronary disease involving the right coronary artery and the left anterior descending coronary artery. There are three major heart arteries and there was cholesterol narrowing and calcification of two of those vessels. There was no evidence of an actual acute myocardial infarction. In fact, the lab studies when he first came in didn't show that there was an acute MI or an acute infarction, but from the sequence of the history fit together with the autopsy, it was quite clear -- in fact, the prosecutor [sic], the physician who did the autopsy said that he thought death was due to an ischemia and most likely to a rhythm disturbance. I went even further, I think what Mr. Yarnell experienced is actually what happens to the majority of the people who have a myocardial infarction. They have a transient occlusion of a vessel or maybe a complete occlusion of a vessel. In Mr. Yarnell's case, what I believe happened was he formed a little thrombus, platelets stuck to the rough area, he started to occlude the vessel and then it dissolved, it spontaneously lysed, opened up the vessel again, but this then caused a rhythm disturbance. In fact, this is one of the more common causes of a rhythm disturbance with an infarction. When the vessel is reopened, not when it first closes, but when it reopens there is even a greater risk. I think that's why they didn't see a blood clot in the artery. Instead, they just saw the calcified plaque.⁴

⁴ Evans Depo. at 8-10.

Dr. Evans opined:

He had a rough area with narrowing and the roughness caused blood to stick and close the vessel passageway. Then when it reopened it caused this additional flow of blood into the area of the heart muscle that had been deprived of blood supply and that most likely is what caused the rhythm disturbance that caused his death.⁵

Dr. Evans testified there was documentation that decedent was having ventricular fibrillation and once it tired out the heart did not have the ability to contract or have any electrical activity. The doctor testified that decedent had a heavy heart which means hypertrophy. The heart muscle wall is thicker and it weighs more due to the heart not being dilated. This was probably caused by hypertension or ischemic disease. Dr. Evans testified that decedent had preexisting coronary artery disease. In Dr. Evans' opinion, decedent's death was a consequence of coronary artery disease.

Dr. Evans also concluded decedent's work environment did not cause the blood clot to form in the artery, nor did it cause Mr. Yarnell's coronary artery disease. The exposure to heat did not contribute to the cardiac arrhythmia which caused his death.

On cross examination, Dr. Evans testified the medical records documented Mr. Yarnell had multiple times of ventricular fibrillation. Dr. Evan testified as follows:

Q. Okay. There is possibility, right, that there is no thrombus at all, that some other thing or reason caused him to go into ventricular fibrillation?

A. I think it's more likely than not that he had a small thrombus form on that rough plaque probably in the left anterior descending coronary artery. It occluded the vessel, dissolved, then he had a reperfusion and fatal ventricular -- episode of ventricular fibrillation.

Q. But there are other reasons for that other than a thrombus, right, your heart can go into ventricular fibrillation for other reasons?

A. Yes, ma'am. I did not see anything else that was obvious in terms of drugs or anything else that was reported.

Q. Okay. Actually, the autopsy did not prove that there was a thrombus, either, correct?

A. The autopsy did not report a thrombus, that is correct.

⁵ *Id.* at 10.

Q. And it also didn't show any damage, cellular damage to the tissue or heart like you would see in a traditional heart attack?

A. No, ma'am, because I don't think there was enough time between his occlusion, reperfusion, arrhythmia and death for the cellular changes to occur that would be seen either grossly or microscopically.

Q. But it's true that cellular damage occurs almost immediately; is that right?

A. Yes, ma'am, but you may not be able to see any cellular damage. In fact, the troponin in the emergency room was negative or normal, so it was not elevated, and it's [sic] takes a little bit of time for that to occur.⁶

Dr. Evans opined:

I do not believe that the description by Mr. Madl and Mr. Leon [in their depositions] of the work environment or the reported temperature that day was the causative factor in Mr. Yarnell [sic] death.⁷

Dr. Joseph Galichia, a board certified cardiologist retained by claimant, testified there was no evidence that the decedent had a heart attack. The doctor opined the decedent died from a fatal arrhythmia. The deceased did have a moderately enlarged heart.

Dr. Galichia described the conditions under which a fatal arrhythmia may occur:

But I do know that in some ways actually, the ambient air temperature was not in any way as important as the temperature of the material he was working with right in front of him because that is -- those temperatures are very high. I don't know what those numbers are, but they are very high. And so no matter how hot it was outside, my guess is that he became pretty much overheated from this. And there's one other facet that involves just any kind of individual. And that is that when you are working and doing things vigorously in the presence of heat, particularly extreme types of heat, this can cause a lot of different problems. In and of itself, be unlikely to cause the arrhythmia but contribute in some way to that significantly.⁸

Dr. Galichia testified:

⁶ *Id.* at 28-29.

⁷ *Id.* at 55.

⁸ Galichia Depo. at 17-18.

I think it was a combination of heat environment as well as the kind of physical activity that he was undergoing. That's -- I think it was a combination of things. And I think it was that activity that put a greater demand on his body for cooling, a greater demand on his body for blood flow and that for one reason or another he was unable to meet those demands.⁹

Dr. Galichia testified the deceased had underlying problems and he was working with hot materials doing physical work. He then had a sudden cardiac death and this physical activity was a contributing factor. The decedent had underlying conditions which were also contributing factors.

When asked about the cause of Mr. Yarnell's fatal arrhythmia, Dr. Galichia testified:

There are a lot of underlying things here. The guy was obese, he had all these other things, he had underlying blockages and things. But it is my feeling whatever he did that day physically and under what conditions he worked contributed to the arrhythmia in a very strong way. If that's all you have got. I mean, that's how I feel. You know, did somebody tell him to run a hundred yards and he dropped dead? No. But he was working with some stuff that affected him; and, you know, my strong professional opinion is that those work activities contributed to this problem.¹⁰

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2009 Supp. 44-501(a) provides:

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends.

K.S.A. 2009 Supp. 44-508(g) provides:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.

⁹ *Id.* at 22.

¹⁰ *Id.* at 40.

The two phrases arising “out of” and “in the course of” employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase ‘out of’ employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises ‘out of’ employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises ‘out of’ employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase ‘in the course of’ employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer’s service.¹¹

It is the function of the trier of fact to decide which testimony is more accurate and/or credible. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.¹²

K.S.A. 2009 Supp. 44-501(e), the so-called “heart amendment,” provides:

Compensation shall not be paid in the case of coronary or coronary artery disease or cerebrovascular injury unless it is shown that the exertion of the work necessary to precipitate the disability was more than the employee’s usual work in the course of the employee’s regular employment.

The Kansas Supreme Court, in *Makalous*,¹³ construed the language contained in the heart amendment dealing with the distinction between exertion required by the employee’s “usual” work and exertion required by “more than” the employee’s “usual” work. The Court stated:

What is usual exertion, usual work, and regular employment as those terms are used in the 1967 amendment to K.S.A. (now 1972 Supp.) 44-501 will generally depend on a number of surrounding facts and circumstances, among which the daily activities of the workman may be one, but only one, among many factors.

¹¹ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

¹² *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

¹³ *Makalous v. Kansas State Highway Commission*, 222 Kan. 477, 565 P.2d 254 (1977).

Whether the exertion of the work necessary to precipitate a disability was more than the workman's usual work in the course of his regular employment presents a question of fact to be determined by the trial court.¹⁴

The ALJ found, and the Board agrees, under the circumstances of this claim, Mr. Yarnell did not, on June 3, 2010, engage in exertion in excess of that required by his usual work in the course of his regular employment. On the date of his demise, the deceased engaged in the same work activities he had performed for approximately 20 years. Only two workers with whom Mr. Yarnell worked and who were familiar with the duties Mr. Yarnell performed, provided testimony in this claim: Mr. Leon and Mr. Madl. Both of those lay witnesses testified Mr. Yarnell was not engaged in any unusual work activity or more exertion than Mr. Yarnell expended in his usual work.

There is some evidence that as Mr. Yarnell gained experience over the years, he was promoted. The specialist position Mr. Yarnell had attained did require more in the way of paperwork and training, thus reducing his participation in road work. There is also evidence Mr. Yarnell tended to do more flagging and driving the pilot car than he had done before. However, the undisputed evidence also establishes the deceased continued to participate in the actual road work along with the rest of the crew. That direct participation included working on or near the lay down machine when the crew was patching in the summer months.

The Kansas Supreme Court, in *Makalous*, noted when a claimant's disability is the product of some external force or agency, and not of the exertion of a claimant's work, the heart amendment is inapplicable: "Where exertion is not the agency which produces the workman's disability, the usual vs. unusual exertion test of the heart amendment is irrelevant."¹⁵

In *Dial*,¹⁶ the Supreme Court found that when an external force other than exertion is the factor which precipitates a cerebrovascular accident, this could result in the disability becoming compensable as a result of that "external force."

In *Dial*, the medical testimony verified the heat to which claimant was subjected led to the disability. There was no mention in the medical evidence of exertion as a causative

¹⁴ *Makalous* at 481; citing *Nichols v. State Highway Commission*, 211 Kan. 919, Syl. ¶ 3 and 4, 508 P.2d 856 (1973).

¹⁵ *Makalous* at 482.

¹⁶ *Dial v. Dome Co.*, 213 Kan. 262, 515 P.2d 1046 (1973).

factor. The court in *Dial* found the evidence indicated the progressive enclosure of the mezzanine on which Mr. Dial worked caused "progressively greater heat." The court also found the cardiovascular injury in *Dial* did not bring the heart amendment into play because the agency which "precipitated" the disability was not the exertion of his work, but rather the external force, in Mr. Dial's instance the extreme heat. The court, in *Dial*, stated:

Where the disability is the product of some external force or agency, and not of the exertion of the claimant's work, the heart amendment has no applicability. In such a case, where exertion is not the agency "necessary to precipitate the disability," the usual vs. unusual exertion test applied in our previous heart amendment cases is irrelevant. Instead, the customary standards are to be applied in determining whether the injury was accidental, and whether it arose out of and in the course of the workman's employment.¹⁷

The court, in *Makalous*, after analogizing *Dial*, found that heat and cold in working environments are recognized as external forces which can cause injury. In *Makalous*, it was the extreme cold to which claimant was exposed that precipitated his heart attack.

In this claim, the expert medical testimony is conflicting regarding the part the heat played, if any, in the spontaneous, ischemically induced, cardiac arrhythmia which resulted in Mr. Yarnell's demise. Although neither testifying physician seemed to place much emphasis on the air temperature and humidity on June 3, 2010, the record reflects about the time of Mr. Yarnell's cardiac event, the temperature at the work site was in the mid-80s, with a relative humidity of about 55%. These conditions are certainly not unusual for an early-June day in Kansas.

The principal heat to which Mr. Yarnell was exposed on June 3, 2010, emanated from the lay down machine and the hot asphalt. There is no dispute that the heat from the lay down machine was extreme. However, the record does not establish the precise temperatures Mr. Yarnell experienced on June 3, 2010, but the evidence does suggest the heat of the asphalt was likely over 250 degrees Fahrenheit, possibly ranging up to 300 degrees, and perhaps higher.

The Board finds the testimony of Dr. Evans is persuasive, more so than Dr. Galichia's testimony. Dr. Evans opined the heat to which Mr. Yarnell was exposed on the date of the alleged accidental injury was not a significant contributing factor as an external force, leading to Mr. Yarnell's death.

¹⁷ *Dial* at 268.

Dr. Evans' opinions are bolstered by a detailed explanation specifically forming the bases for his conclusions. Dr. Evans found the autopsy did not show that Mr. Yarnell suffered a myocardial infarction, but did show the presence of calcified plaque with estimated 60% intrusion in the right coronary artery and a 75% intrusion in the left anterior descending coronary artery. Hence, Mr. Yarnell had significant coronary artery disease in two of his three major coronary arteries before June 3, 2010.

Dr. Evans explained blood platelets adhered to calcified arterial plaque, creating a blood clot, also referred to in the record as a thrombus. The thrombus was probably transient and dissolved spontaneously, which explained the lack of blood clotting or evidence of a myocardial infarction at the autopsy. In Dr. Evans' opinion, when the blockage created by the clot dissolved, it caused a reperfusion ventricular fibrillation from which Mr. Yarnell never recovered. Dr. Evans stated emphatically the heat in which the deceased worked on the date of death did not cause or contribute to the development of the blood clot and coronary obstruction that ultimately caused the arrhythmia and the unfortunate death of Mr. Yarnell.

Moreover, the record shows Dr. Evans was provided with documentation Dr. Galichia was not. Dr. Evans was provided with and reviewed the depositions of Mr. Leon and Mr. Madl, which contained information regarding Mr. Yarnell's work activities and the temperatures to which he was exposed. Dr. Evans was also provided with Dr. Galichia's deposition and the national weather service data from June 3, 2010.

In contrast, Dr. Galichia provided little in the way of rationale supporting his opinions. Dr. Galichia testified Mr. Yarnell's work activity, the extreme heat, and "underlying conditions" (the only underlying conditions mentioned by Dr. Galichia were Mr. Yarnell's obesity and "blockages") all combined to cause the cardiac arrhythmia that led to the death of Mr. Yarnell. Dr. Galichia concluded the work and the heat put demands on Mr. Yarnell's cooling and blood flow which "for one reason or another" could not be met by the deceased. The Board is left to speculate about the bases for Dr. Galichia's opinions. The Board finds the opinions of Dr. Galichia less reasonable and less persuasive than those of Dr. Evans.

CONCLUSIONS OF LAW

The Board finds claimant did not sustain her burden of proof that her husband's death on June 3, 2010, arose out of and in the course of his employment with respondent. The exertion of claimant's work on June 3, 2010, was not more than the exertion of his usual work in the course of his regular employment. The preponderance of the credible evidence does not support the conclusion that the heat to which Mr. Yarnell was exposed

on June 3, 2010, caused or contributed to the coronary artery disease and the heart rhythm disturbance that resulted in his demise.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹⁸ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the Board's decision that the Award of ALJ Bruce E. Moore dated May 30, 2012, is hereby affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of March, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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¹⁸ K.S.A. 2009 Supp. 44-555c(k).